

CLAIM SUMMARY / DETERMINATION FORM

Date	: 7/14/2010
Claim Number	: N08057-022
Claimant	: United States Environmental Services, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: Dawn Unglesbee
Amount Requested	: \$583,254.85

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision with M/T TINTOMARA and discharged oil into the Mississippi River, a navigable waterway of the United States.

II. Responsible Party

American Commercial Lines LLC (ACL) owned the barge at the time of the incident and is a responsible party under the Oil Pollution Act (OPA).

III. The Claimant and the Claim

Pursuant to a contract with ACL, the Claimant, United States Environmental Services LLC, (USES), provided response services¹ from July 28, 2008 through August 3, 2008², associated with the DM 932 discharge of oil into the Mississippi River. The Claimant subsequently subcontracted with Lawson Environmental Service L.L.C. to provide additional response services. ACL made one payment to USES in the amount of \$4,057,619.27;³ however, ACL did not pay all removal costs presented by the Claimant.⁴ This claim represents the uncompensated removal costs not paid by ACL.

On May 7, 2009 USES submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of \$583,254.85 for the time period of July 28, 2008 through August 3, 2008. The NPFC sent the Responsible Party (RP) a notification letter dated May 14, 2010, to Ms. Dawn Landry, ACL – General Counsel and Mr. John A.V. Nicoletti of Nicoletti, Hornig & Sweeney, ACL – External Counsel.⁵ ACL acknowledged receipt of the invoices that are subject of this claim by way of ACL's Financial Audit. (See Enclosure 1—ACL audit).

During the incident, the Claimant provided response resources and services under its contract with ACL, Agreement to Conduct Emergency Response Services, July 23, 2008, and executed by ACL on July 29, 2008 (Agreement). The Claimant provided its published rate schedule to ACL.⁶

¹ See, Claim Form, signed by Mr. Barry Thibodeaux, dated May 6, 2009, Attachment E, Agreement to Conduct Emergency Response Services, signed by Mr. Sam George on July 29, 2008.

² See, 33 CFR §136.105(b).

³ See, USES spreadsheet dated January 6, 2009 to the NPFC which identifies a payment made to USES by ACL

⁴ See, USES Invoices No. 80140122 Summary for dates July 28, 2008 through August 3, 2008.

⁵ See, NPFC letter, to ACL, re: Claim No. N08057-022, dated May 14, 2009.

⁶ Standard USES Rate Schedule dated July 1, 2008, Version 4.01LA

The services provided by the Claimant were acknowledged by ACL's designated Zone Managers, who acted as the Qualified Individual (QI) representatives for ACL in various zones throughout the removal response. Specifically, the Claimant submitted daily sheets to the respective Zone Manager(s) which listed the labor and materials/equipment provided by the Claimant for each day of the response in a specific zone location. The Zone Managers approved the materials, equipment and labor identified on each daily by signing the document.⁷ Beneath each signature, the Zone Manager made the notation "subject to audit."

IV. Audit

ACL prepared a financial audit for USES invoices, providing a line by line itemization of materials, equipment and personnel submitted for payment by USES and payments made to USES by ACL. Upon request, ACL provided a copy of this audit to the NPFC. The NPFC found that ACL's auditors focused on whether the costs were properly supported, operationally reasonable and necessary in accordance with ACL's standards. Based upon the invoices and the audit, it is clear that ACL did not pay the USES invoices within the 30 days timeframe set forth in the July 29, 2008 Agreement.

V. APPLICABLE LAW:

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 of OPA and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan (NCP) and uncompensated damages. Removal costs are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." 33 USC § 2701(31).

"Oil" is defined in relevant part, at 33 U.S.C. § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

"Navigable waters" means "the waters of the United States, including the territorial sea". 33 U.S.C. § 2701(21)

"Remove" or "removal" means "containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches". 33 U.S.C. 2701(30).

"Removal costs" are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident". 33 U.S.C. 2701(31).

Under 33 U.S.C. §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 U.S.C. §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

⁷ One responsibility of ACL Zone Managers was to confirm that the materials, equipment and services billed on each day for a certain period of time and at a given location have in fact been provided and accounted for.

Under 33 CFR 136.101(a)(2), except as provided under section 1012(h)(3) of the Act (33 U.S.C. 2712(h)(3)) (minors and incompetents), the Fund will consider a claim only if presented in writing to the Director, NPFC, within the following time limits: (2) For removal costs, within six years after the date of completion of all removal actions for the incident. As used in this paragraph, "date of completion of all removal actions" is defined as the actual date of completion of all removal actions for the incident or the date the FOSC determines that the removal actions which form the basis for the costs being claimed are complete, whichever is earlier.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR §§ 136.105(b) and (e)(12) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident and the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs. In addition, under 33 CFR Part 136, the claimant bears the burden to prove that the removal actions were reasonable in response to the scope of the oil spill incident. The NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR § 136.203, "a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC [Federal On-Scene Coordinator] to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR § 136.205, "the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC." (Emphasis added).

VI. DETERMINATION OF LOSS:

A. Overview:

1. The removal actions were coordinated with FOSC as evidenced by Incident Action Plans and United States Coast Guard (USCG) Pollution Reports.
2. The incident involved the discharge and continuing substantial threat of discharge of "oil" as defined in OPA 90, 33 U.S.C. §2701 to "navigable waters" CITE.
3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
4. In accordance with 33 CFR § 136.101(a)(2), the claim was submitted on time.
5. USES presented its removal costs to the RP more than 90 days prior to the submission of the claim to the NPFC. The NPFC notified the RP of the claim submission and the RP has provided a copy of their audit of USES' response costs
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that the majority of removal costs presented were for actions in accordance with the NCP and reasonable and allowable under the OPA and 33 CFR § 136.203 & 205 with the exception of denied costs itemized in the attached spreadsheet:

(See, Enclosure 2 – ACL audit which incorporates the results of the NPFC’s adjudication).

B. Analysis:

USES claims that all claimed costs are for uncompensated removal costs incurred for this incident for the time period of July 28, 2008 through August 3, 2008 are compensable removal costs, payable by the OSLTF as presented by the Claimant.

The NPFC Claims Manager reviewed the Claimant’s actual cost invoices and dailies to confirm whether the Claimant had incurred these costs and whether these costs were adequately documented and reasonable. As noted above, ACL appointed Zone Managers who acted as Qualified Individual (QI) representatives for ACL in various response zones on specific days. The NPFC Claims Manager determined, that the response activities performed by the Claimant were acknowledged by the designated Zone Managers on the dailies provided by USES and by ACL’s audit.

The Claims Manager reviewed the actual cost invoices and dailies to confirm that the Claimant had incurred the costs claimed. The review focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR Part 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the National Contingency Plan, 33 CFR Part 300 or as directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

During the adjudication, the Claims Manager reviewed the Pollution Reports and Incident Action Plans (IAPs) which corroborated that the claimed actions had taken place in the field. The NPFC also reviewed the comments contained in ACL’s financial audit. Although ACL denied certain costs, the NPFC approved these costs where adequately documented by USES. Given that ACL’s Zone Managers acknowledged and verified personnel, equipment and services rendered each day, as evidenced by their signed “dailies” and corroborated by other documentation, the NPFC determines that these actions were compensable removal actions under OPA. Moreover, because the services and materials/equipment listed on the daily sheets were provided pursuant to a contract with specified rates, agreed upon in advance of the incident by the parties, the NPFC further finds that USES has satisfied its burden of showing that the approved amounts claimed were adequately documented and reasonable.

During review of USES’ claim, the NPFC Claims Manager determined that USES had only reimbursed their subcontractor, Lawson Environmental, at a 70% of the invoiced amount. Thus, when the NPFC adjudicated this claim, the NPFC requested that USES identify all line items for Lawson Environmental resources that were part of the USES invoice. The NPFC then denied 30% of all Lawson costs that the NPFC determined to be OPA compensable because the Claimant had not paid those costs to Lawson thus they are not uncompensated costs under the OPA.

In order to address the discrepancies in this claim, the NPFC created a column within the ACL audit entitled “NPFC identified overpayment made by ACL on LES items”. It is clear from the spreadsheet that when ACL performed its financial audit of the USES invoice, the Claimant failed to identify that it had not paid 100% of each Lawson item as invoiced. This resulted in an overpayment by ACL to USES for ACL approved Lawson charges.

NPFC denied the following costs as identified in the ACL audit:

7/28/08 – Labor Denied in the amount of	\$16,075.60
7/28/08 – Mat/equip Denied in the amount of	\$ 6,799.00
7/29/08 – Labor Denied in the amount of	\$32,351.10
7/29/08 – Mat/equip Denied in the amount of	\$ 3,885.00
7/29/08 – Labor and Equip ADJ Denied	\$ 342.00
7/30/08 – Labor Denied in the amount of	\$28,791.00
7/30/08 – Mat/equip Denied in the amount of	\$ 6,838.53
7/31/08 – Labor Denied in the amount of	\$33,579.50
7/31/08 – Mat/equip Denied in the amount of	\$ 4,438.50
8/01/08 – Labor Denied in the amount of	\$29,021.80
8/01/08 – Mat/equip Denied in the amount of	\$ 2,001.00
8/02/08 – Labor Denied in the amount of	\$28,178.40
8/02/08 – Mat/equip Denied in the amount of	\$ 5,043.50
8/03/08 – Labor Denied in the amount of	\$44,100.30
8/03/08 – Mat/equip Denied in the amount of	\$ 2,494.50
8/03/08 – Labor and Equip ADJ Denied	\$ 3,150.00
Total Denied Amount for N08057-022:	\$247,089.73

Lastly, during the adjudication, the NPFC identified six formula errors made by ACL during their audit which resulted in a \$94,473.50 difference on ACL approved costs. The following is a summary of the ACL formula errors that were corrected during the NPFC audit:

7/29/08 – Mat/equip changed from \$138,054.00 to \$173,644.00 =
Difference = \$35,590.00

7/30/08 – Mat/equip changed from \$170,251.56 to \$173,866.56 =
Difference = \$3,615.00

7/31/08 – Mat/equip changed from \$162,032.50 to \$177,487.50 =
Difference = \$15,455.00

8/01/08 – Mat/equip changed from \$183,027.50 to \$186,312.50 =
Difference = \$3,285.00

8/02/08 – Mat/equip changed from \$150,087.50 to \$193,665.00 =
Difference = \$43,577.50

8/03/08 – Mat/equip changed from \$181,495.00 to \$174,446.00 =
Difference of Credit (\$7,049.00)

It is important to note that while the NPFC identified a 30% overpayment by ACL to USES on certain Lawson charges, the NPFC has not offset these payments against the documented but uncompensated amounts owed to the Claimant.⁸

VII. Determined Amount:

⁸ See, Enclosure 2 – ACL audit which incorporates the results of the NPFC’s adjudication.

The NPFC Claims Manager hereby determines that the Claimant incurred \$336,165.12 of uncompensated OPA compensable removal costs that are supported by the evidence. This amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the Claimant and adjudicated by the NPFC under claim# N08057-022.

Claim Supervisor: *Donna Hellberg*

Date of Supervisor's review: *7/15/10*

Supervisor Action: *Approved*

Supervisor's Comments:

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

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5890
7/15/2010

SENT VIA E-MAIL

[REDACTED]@usesgroup.com

United States Environmental Services, LLC
365 Canal Street
Suite 2500
New Orleans, LA 70130

Re: Claim Number N08057-022

Dear Mr. Schenck:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that \$336,165.12 is full compensation for OPA claim number N08057-022.

This determination is based on an analysis of the information submitted. Please see the attached determination for further details regarding the rationale for this decision.

All costs that are not determined as compensable are considered denied. You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claims. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. Disposition of the reconsideration will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include corresponding claim number.

Mail reconsideration request to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

If you accept this determination, please sign the enclosed Acceptance/Release Form where indicated and return to the above address.

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid Central Contractor Registration (CCR) record prior to payment.

If you do not, you may register free of charge at www.ccr.gov. Your payment will be mailed or electronically deposited in your account within 60 days of receipt of the Release Form.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at [REDACTED]

Sincerely,

Dawn Unglesbee
Claims Manager

ENCL: Claim Summary / Determination Form
Acceptance/Release Form
Encl (1) ACL Audit
Encl (2) ACL audit which incorporates the results of the NPFC's adjudication

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
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Staff Symbol: (CA)
Phone: [REDACTED]
E-mail: [REDACTED]@uscg.mil
Fax: 202-493-6937

Claim Number: N08057-022	Claimant Name: United States Environmental Services, LLC 365 Canal Street Suite 2500 New Orleans, LA 70130
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I, the undersigned, ACCEPT the determination of \$336,165.12 as full compensation for the removal costs and damages paid or incurred by Claimant for services provided by the Claimant listed in the Spreadsheets of costs (attached hereto and incorporated by reference as if fully set forth herein), and claimed to the Oil Spill Liability Trust Fund (Fund) under Claim Number N08057-022. These costs resulted from the below-described incident.

Date: 23 July 2008

Location: Mississippi River

Subject: DM932 Oil Spill incident.

This determination represents full and final release and satisfaction of all removal costs and damages paid or incurred by Claimant for services provided by the clamant and listed in the Spreadsheets of costs (attached hereto and incorporated by reference as if fully set forth herein), and claimed to the Oil Spill Liability Trust Fund (Fund) under Claim Number N08057-022 under the Oil Pollution Act of 1990 (33 U.S.C. 2712(a)(4)). This determination is not an admission of liability by any party. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the loss. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from the incident. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for costs which are the subject of the claim against the Oil Spill Liability Trust Fund (Fund).

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund any compensation received from any other source for the same claim, providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. 287 and 1001).

_____	_____
Title of Person Signing	Date of Signature
_____	_____
Typed or Printed Name of Claimant or Name of Authorized Representative	Signature

_____	_____
Title of Witness	Date of Signature
_____	_____
Typed or Printed Name of Witness	Signature

_____	_____	_____
DUNS #	Bank Routing Number	Bank Account Number